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No. 02-0058

Supreme Court, U.S.
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In The
Supreme Court of the United States

EASTERN PILOTS MERGER COMMITTEE,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit Court of Appeals correctly concluded that its previous decision in *In re Continental Airlines, Inc.*, 125 F.3d 120 (3d Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998) precludes a post-petition award of seniority integration into reorganized Continental's workforce?

CORPORATE DISCLOSURE STATEMENT

Eastern Pilots Merger Committee, Petitioner v. Continental Airlines, Respondent

Pursuant to Supreme Court Rule 29.6, Continental Airlines, Inc. states that there is no parent or publicly held company owning 10% or more of the corporation's stock.

/s/ James L. Patton, Jr.
(Signature of Counsel of Record)

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CONTINENTAL'S BRIEF IN OPPOSITION OF THE PETITION

The Eastern Pilots Merger Committee ("EPMC" or "the Pilots"), through its Writ of Petition for Certiorari (the "Petition"), asks this Court to decide whether the Court of Appeals for the Third Circuit erred when it determined that EPMC's seniority rights could be reduced to a monetary proof of claim in bankruptcy. If this question sounds familiar to this Court, there is a good reason. It is virtually the identical question that members of EPMC asked this Court to decide in an earlier petition in this case.

In 1997, a group of airline pilots, including members of EPMC, petitioned this Court to grant certiorari regarding the decision of the Third Circuit Court of Appeals in *In re Continental Airlines, Inc.*, 125 F.3d 120 (3d Cir. 1997) ("*Continental I*"). In their petition, the Pilots asked this Court to review whether the substitution of their claims for seniority rights with a claim for monetary damages in bankruptcy violated the terms of 11 U.S.C. § 1113 (Resp. App. 2).[1] This Court denied the petition. See *LPP Claimants v. Continental Airlines, Inc.*, 522 U.S. 1114 (1998).

Now, almost five years after their petition was denied, the Pilots are back before this Court asking the same question in a related proceeding, *In re Continental Airlines, Inc.*, 279 F.3d 226 (3d Cir. 2002) ("*Continental II*"). In *Continental II*, however, the Third Circuit merely affirmed the lower court's interpretation of *Continental I* and imposition of sanctions against the Pilots for violating the

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[1] "Resp. App. ___" refers to Respondent's Appendix to Response to Petition for a Writ of Certiorari.

confirmation order, which was affirmed by *Continental I*. The Pilots make little effort to recast the issue, once again arguing in the opening paragraph of the Petition that the Third Circuit's decision that seniority rights could be reduced to a dischargeable bankruptcy claim "effectively nullified Bankruptcy Code section 1113." Petition at 1. Thus, the question remains the same and only the pool of petitioners, which is a subset of the original group of pilots, has changed.

Beyond the obvious reasons for denying this writ – that this Court, in *Continental I*, previously declined to review the issue raised in the Petition – the arguments made by EPMC remain unpersuasive. The Pilots first argue that *Continental II* must be reconsidered because the Third Circuit's treatment of the Pilots' claims is in conflict with one of this Court's decisions and a decision from the Court of Appeals for the Fifth Circuit. Upon examination, however, the purported conflict is illusory. The Pilots have also failed to demonstrate that this issue is of sufficient public importance to warrant this Court's review. In the end, the Petition contains the same, recycled appeal that has been the basis for nearly ten years of litigation in this case.

The Respondent respectfully requests that the Petition be denied and the decision in *Continental II* left undisturbed.

STATEMENT OF FACTS AND THE CASE

The Collective Bargaining Agreement

This unending appeal traces its origin to a collective bargaining agreement between Eastern Airlines ("Eastern") and its pilots' union, the Air Lines Pilot Association ("ALPA") that was executed on February 23, 1986. (Pet. App. 54a).[2] The collective bargaining agreement contained labor protective provisions ("LPPs") that purported to secure protection of Eastern pilots' seniority rights in the event of a merger. *Id.* The LPPs, in effect, would allow for the integration of Eastern's seniority lists with the other carrier's list. *Id.*

On February 24, 1986, Texas Air Corporation, parent of Continental Airlines, Inc. ("Continental") acquired Eastern. *Id.* ALPA asserted that the acquisition was a merger requiring seniority integration of the Eastern and Continental pilots' seniority lists under the LPPs. *Id.* The matter was thereafter submitted to arbitration after Eastern and Continental took the position that the issue was not subject to bargaining. (Pet. App. 55a).

The Reorganization Cases

In 1989, before the matter was arbitrated, Eastern filed petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") and contended that the arbitration was stayed under section 362 of the Bankruptcy Code. (Pet. App. 56a). After several

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[2] "Pet. App. ___" refers to Petitioner's Appendix to Petition for a Writ of Certiorari.

lower court decisions and appeals, the Second Circuit held the automatic stay did not preclude arbitration. *Id.*

On December 3, 1990, Continental filed for chapter 11 protection in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). Continental informed the arbitrator that it was in bankruptcy and, therefore, its participation in the arbitration was stayed pursuant to section 362 of the Bankruptcy Code. (Pet. App. 57a). ALPA and Eastern, on the other hand, proceeded under the Second Circuit's directive, and met with the arbitrator at a pre-arbitration conference in April 1991. At the conference, ALPA took the position that it was entitled to prospective integration of the Eastern and Continental pilots' seniority lists, back pay, and front pay from the date of the arbitration award until the Eastern pilots began flying for Continental. *Id.*

The Eastern Pilots' Claims in the Continental Bankruptcy

The next event would play a significant role in the outcome of this dispute. During the course of Continental's bankruptcy proceedings, ALPA on behalf of its members, filed proofs of claim against Continental and its related debtors. (Pet. App. 3a). In the claims, ALPA contended that the former Eastern pilots were entitled to specific performance of seniority rights under the LPPs as well as monetary damages. *Id.*

These proofs of claim created issues that Continental needed to address prior to confirmation of its plan of reorganization. Continental had an agreement with its investors who required a number of conditions to closing, including the entry of an order providing that the former

Eastern pilots were not entitled to specific performance or other injunctive, equitable, or other prospective relief against the debtors or the reorganized Continental. (Pet. App. 88a).

To resolve the ALPA claims, Continental requested the Bankruptcy Court to declare that the claims were, at best, pre-petition unsecured claims, compensable by an award of monetary damages. (Pet. App. 58a) ALPA, in turn, argued that the claims were not unsecured pre-petition claims that could be converted to money damages, and that only an arbitrator could determine the appropriate remedy under the LPPs. *Id.*

On February 11, 1993, the Bankruptcy Court held that an award of monetary damages would be available as a matter of law in lieu of prospective relief, including specific performance of the seniority rights, if the former Eastern pilots' claims were ultimately found to be valid. (Pet. App. 59a). As a result, the Bankruptcy Court concluded that the claims constituted dischargeable "claims" within the meaning of section 101(5) of the Bankruptcy Code. *Id.*

On April 16, 1993, the Bankruptcy Court confirmed Continental's Second Amended Joint Plan of Reorganization. The confirmation order included its prior rulings that any valid claims based on the LPPs would give rise to a right of payment dischargeable in bankruptcy, and that the Eastern pilots had no right to injunctive, equitable or other prospective relief. (Pet. App. 60a). The order also enjoined any present or former employee of Eastern from commencing, conducting or continuing any suit, arbitration, action or other proceeding against Continental. *Id.*

The First Round of Appeals

ALPA and a group of former Eastern pilots (the "LPP Claimants") appealed the confirmation order, during which time ALPA, representing approximately two-thirds against those who filed proofs of claims, settled its dispute with Continental. The LPP Claimants did not settle and continued with their appeal.[3]

The United States District Court for the District of Delaware (the "District Court") affirmed each of the Bankruptcy Court's orders, except for the injunction of the arbitration proceedings.[4] (Pet. App. 62a). The District Court held that the Bankruptcy Court had the jurisdiction and power to determine the nature and treatment of all claims arising under the collective bargaining agreement between Eastern and its pilots. *Id.* Therefore, it affirmed the Bankruptcy Court's order that any award for seniority integration be treated as a general unsecured claim for monetary damages. *Id.* Unsuccessful at the District Court level, the LPP Claimants appealed to the Third Circuit Court of Appeals.

In *Continental I*, the Third Circuit affirmed the District Court, ruling that "the Bankruptcy Court was well

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[3] ALPA had filed proofs of claims on behalf of all Eastern pilots, including the LPP Claimants. (Pet. App. at 53a n.1). ALPA's representation of the LPP Claimants ceased, however, after they instituted an action against ALPA in federal court for defamation, breach of the duty of fair representation, and RICO violations. (Pet. App. at 58a n. 4).

[4] The District Court vacated the injunction on the grounds that the Bankruptcy Court did not have jurisdiction under section 1113 of the Bankruptcy Code and that it had not adequately set forth the reasons for the issuance of the injunction as required by Federal Rule of Civil Procedure 65(d). (Pet. App. 62a)

within its authority to exercise jurisdiction over the issue of the status of the bankruptcy claims." (Pet. App. 70a). More importantly for purposes of the instant Petition, the Third Circuit concluded "that the right to seniority integration gives rise to a 'right of payment' such that the remedy constitutes a 'claim' dischargeable in bankruptcy." (Pet. App. 83a). The Third Circuit recognized that money damages were an appropriate alternative to the equitable remedy because relief in the form of seniority rights could result in the displacement of Continental pilots and have adverse consequences on the debtors' workforce. (Pet. App. 82a-83a). The LPP Claimants then filed a petition for a writ of certiorari that was denied by this Court. *LPP Claimants v. Continental Airlines*, 522 U.S. 1114 (1998).

One would have believed, with the question of whether a claim for seniority rights could be treated as a claim in bankruptcy resolved, and the exhaustion of all avenues of appeal, that the dispute over this issue had finally ended. Not so.

The New Jersey Action and the Second Round of Appeals

On October 23, 1998, EPMC, composed of a group of former Eastern pilots, filed a complaint in the United States District Court for the District of New Jersey (the "New Jersey Court") against Continental seeking a declaratory judgment and injunctive relief (the "New Jersey Action"). Ignoring their agreement to arbitrate, EPMC asked the New Jersey Court to enforce the LPPs and declare that the collective bargaining agreement required Continental to implement the seniority integration

clauses. (Pet. App. 19a; 35a). In response to the commencement of the New Jersey Action, Continental filed a motion with the Bankruptcy Court to compel compliance with the confirmation order, enjoin the New Jersey Action, and impose sanctions against EPMC. *Id.*

The Bankruptcy Court ruled that the Third Circuit had determined that all claims held by members of EPMC, whether before or after bankruptcy, seeking equitable or non-equitable remedies, had been discharged by the confirmation order. Accordingly, the Bankruptcy Court held that EPMC violated the confirmation order by initiating the New Jersey Action and that Continental was entitled to sanctions against EPMC for its knowing and willful conduct. (Pet. App. 49a). EPMC thereafter appealed the Bankruptcy Court's decision to the District Court.

EPMC fared no better on appeal. In its written decision, the District Court recognized that the bankruptcy process would be meaningless "if *Continental I* did not require that any claim for prospective relief through specific performance be discharged." (Pet. App. 4a-5a). The District Court held that although the collective bargaining agreement survived the bankruptcy process, EPMC's demand for specific performance of the seniority integration clause did not. (Pet. App. 21a-22a). Thereafter, EPMC filed its notice of appeal to the Third Circuit.

Having been called upon to interpret its decision in *Continental I*, the Third Circuit framed the critical question in simple terms: "Did this court in *Continental I* adjudicate only claims for pre-petition seniority rights or did our holding include also rights arising post-petition?" (Pet. App. 7a). Noting it was not a difficult decision, the

Court held that the relief defined in *Continental I* was, and continues to be, the only remedy available to EPMC.

The Third Circuit's holding in *Continental II* could not have been more narrowly tailored. It simply held that *Continental I* decided the issues presented in *Continental II*. Undeterred, EPMC petitioned the Third Circuit for rehearing and for a rehearing *en banc*. Those petitions were denied.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED BECAUSE THIS SAME APPEAL HAS ALREADY BEEN MADE BY THE PETITIONER AND DENIED BY THIS COURT.

This Court has already declined to hear the question presented in the Petition. In its prior petition for *certiorari* filed in 1997, the former Eastern pilots characterized the issue on appeal as "[w]hether the Third Circuit's opinion [in *Continental I*] which authorize[d] the Debtor to unilaterally alter or terminate the labor protection provisions of a collective bargaining agreement under circumstances where 11 U.S.C. § 1113 was not complied with violates the mandate of Congress . . . ?" (Resp. App. 2). The Court denied *certiorari*. *LPP Claimants v. Continental Airlines*, 522 U.S. 1114 (1998).

Although the Pilots take great pains to frame the question presented in their current Petition in a way different from the way they framed it last time, it is in reality identical to their petition for *certiorari* filed in 1997. For instance, in their current Petition, the Pilots state that "[t]he question presented is whether, in these

circumstances, the Court of Appeals erred in holding that those asserted seniority rights could be reduced to bankruptcy claims, dischargeable in Continental's bankruptcy proceedings?" Similarly, in the 1997 petition for *certiorari*, the Eastern pilots argued that the Third Circuit was mistaken in its "express reliance on 11 U.S.C. § 101(5) to alter the right to seniority integration provided for in the collective bargaining agreement into a 'claim' which 'gives rise to a right of payment.'" (Resp. App. 18).

This is also the second time the Pilots have argued that the Third Circuit's decision violated section 1113 of the Bankruptcy Code. In the 1997 petition, they asserted that the Third Circuit's opinion violated section 1113 because it "Authorized The Debtor To Unilaterally Alter Or Terminate The Labor Protective Provisions Of [the] Collective Bargaining Agreement." (Resp. App. 13). Five years later, this same argument resurfaces with the Pilots complaining that the Third Circuit's decision interpreting and enforcing its prior decision "effectively nullified Bankruptcy Code §1113 . . . ." Petition at 1.

The fact that the arguments and issues presented in both petitions are virtually identical should not be a surprise to anyone. After all, *Continental II* was merely an explanation of *Continental I*. The Third Circuit characterized the critical question in *Continental II* as seemingly uncomplicated. (Pet. App. 7a). That is, did "*Continental I* adjudicate only claims for prepetition seniority rights or did our holding include also rights arising post-confirmation?" The answer, as explained by the court, was not difficult. "Suffice it to say that when we said 'any claim based on an award of seniority integration, we meant precisely what we said.' We hold that the proposition now urged upon us by appellants has been decided and is

totally controlled by our decision in *Continental I.*" (Pet. App. 10a-11a).

In short, what the Pilots really want is for this Court to grant *certiorari* and revisit the Third Circuit's *Continental I* decision, a decision this Court already declined to review.

The Pilots should not be allowed two bites at the apple when everyone else gets one.

CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT IN AUTHORITY THAT REQUIRES THIS COURT'S INTERVENTION

Under the traditional criteria, the decision below does not warrant this Court's review. This is because, contrary to the Pilots' position, *Continental II* does not conflict with this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), or the Fifth Circuit's decision in *Century Indemnity Co. v. National Gypsum Co. (In re National Gypsum Co.)*, 208 F.3d 498 (5th Cir.), *cert. denied*, 531 U.S. 871 (2000). Indeed, the Pilots present the same argument made in *Continental I,* reconstituted in a way to fit within the parameters of this Court's scope of review. The supposed conflict presented by the Pilots is easily dismantled upon examination of the cases.

In *Continental II*, the Third Circuit reiterated the *Continental I* holding that the Pilots' seniority rights arising out of the LPPs, including those arising post-confirmation, had been discharged as a "claim" under Continental's plan of confirmation. The appellate court's reasoning was straightforward: All of the Pilots' claims for seniority rights were based on the LPPs, the Pilots made

claims in bankruptcy for seniority relief which, in turn, could be satisfied by payment of monetary damages, and these claims were dischargeable in bankruptcy. So there would be no doubt, the Third Circuit clarified that the Pilots' claims included pre and post-confirmation relief, and referred to EPMC's own characterization of its claims as seeking both pre *and* post-confirmation relief. (Pet. App. 8a).

National Gypsum, the decision that the Pilots cite as being at odds with *Continental II*, had nothing to do with whether an equitable claim can be satisfied by the payment of monetary damages in a bankruptcy proceeding. Far from being a "virtually identical fact pattern" as the Pilots argue at page 20 of the Petition, the issue in *National Gypsum* was whether a chapter 11 plan's assumption of an executory contract with a zero cure amount was effective and properly noticed to the party to the agreement. In *National Gypsum*, a creditor sought judgment against the debtor post-confirmation because of the debtor's refusal to pay an indebtedness arising out of a pre-petition executory contract. *National Gypsum*, 208 F.3d at 503. The debtor had assumed the contract when it filed its plan of reorganization. *Id.* at 502. The debtor, in response, contended that the debt had been discharged through the plan confirmation process and because the creditor had never filed a proof of claim. *Id.* at 503. The Fifth Circuit concluded that, since the contract had been assumed, it did not give rise to a claim under section 101(5) of the Bankruptcy Code and thus the debt was not subject to discharge. *Id.* at 506-07.

Given the distinct facts of each case, one must wonder what basis there is for the Pilots' contention that *National Gypsum* is "diametrically opposed" to the holding in

Continental II. Presumably, the Pilots are relying on their argument, presented in *Continental I*, that because the collective bargaining agreement was never rejected by Continental, any claims arising out of the agreement, including those for seniority rights, continue to be unsatisfied obligations of the debtor, and thus not dischargeable. The fundamental flaw with this argument, and one of the bases for the Third Circuit's decision, was that Continental, unlike the debtor in *National Gypsum*, never assumed the agreement at issue. *Continental II* ("The reality is the [collective bargaining agreement] was never assumed.") An executory contract, including a collective bargaining agreement, may not be assumed without bankruptcy court approval in accordance with section 365 of the Bankruptcy Code. *In re Trans World Airlines, Inc.*, 145 F.3d 124, 136 (3d Cir. 1998) ("[section] 365 allows a trustee, or debtor-in-possession, subject to court approval, to 'assume' or 'reject' an unexpired lease . . . . ") (*quoting Counties Contracting & Constr. Co. v. Constitutional Life Ins. Co.*, 855 F.2d 1054, 1060 (3d Cir. 1988) (finding court approval "mandated for effective assumption under [section 365(a)]") (emphasis added)). In short, Continental never assumed the collective bargaining agreement under the Bankruptcy Code.

The second distinction between *Continental II* (and *Continental I*) and *National Gypsum* is that the non-debtor in *National Gypsum* never filed a proof of claim. The Pilots in the instant case, of course, filed proofs of claim in the bankruptcy case, and requested, among other things, seniority integration, back pay and front pay. By filing proofs of claim against the bankruptcy estate, the Pilots triggered the process of "allowance and disallowance of claims," and thereby subjecting themselves to the

bankruptcy court's equitable power. *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990). The Third Circuit reviewed this concept in painstaking fashion in both *Continental I* and *Continental II*. The appellate court concluded that, although the interpretation of the collective bargaining agreement was the domain of the arbitrator, the Bankruptcy Court had jurisdiction to determine that any rights to seniority possessed by the Pilots (pursuant to its proofs of claims) could be satisfied by the payment of money damages.

Of course, there is one similarity between *Continental I* and *National Gypsum* that the Pilots conveniently ignore in their Petition: Parties in both cases unsuccessfully petitioned this Court for a writ of *certiorari*. *See National Gypsum*, 531 U.S. 871 (2000). If, as the Pilots contend, the conflict between this case and *National Gypsum* was so apparent, then it most certainly would have been an issue in the latter's petition. The fact that this Court denied *certiorari* in *National Gypsum* indicates, however, that any conflict between *Continental I* and *National Gypsum* was not sufficiently compelling to warrant review. The exaggerated conflict between *National Gypsum* and *Continental II* (which, is just a reiteration of the holding in *Continental I*) deserves even less consideration.

EPMC's claim that *Continental II* is inconsistent with this Court's ruling in *Bildisco* is even more puzzling than its efforts to create a conflict between *Continental II* and *National Gypsum*. Indeed, while the Pilots state in the argument heading of their Petition that *Continental II* is inconsistent with this Court's decision in *Bildisco*, they never truly explain how. Instead, the Pilots repeat the same argument they made to this Court in their petition for a writ of *certiorari* in *Continental I*, namely, that the

substitution of the equitable remedy of seniority amounted to an alteration or termination of the terms of the collective bargaining agreement in violation of section 1113 of the Bankruptcy Code. Of course, this Court refused *certiorari* on that issue, and the Third Circuit in both *Continental I* and *Continental II* expressly rejected it. In *Continental I*, for instance, the court noted that the "[s]ubstitution of the equitable remedy in no way amounts to an alteration or termination of the terms of the collective bargaining agreement." *Continental I* at n.15. Its holding was limited to a pure bankruptcy question, i.e., the treatment of the Pilots' claims under bankruptcy law. *Continental I*, 125 F.3d at 135. *Continental II* affirmed this holding.

The Pilots would also be wrong to suggest that this Court has not allowed equitable claims to be converted into money damages dischargeable in bankruptcy. In *Ohio v. Kovacs*, for instance, the state of Ohio obtained an injunction ordering the debtor to clean up a hazardous waste site. *Ohio v. Kovacs*, 469 U.S. 274 (1985). When the debtor failed to comply with the injunction, a receiver was appointed to take possession of the debtor's property and the injunction. The debtor filed for bankruptcy before the cleanup was completed. The question before this Court was whether the obligation of the debtor under the injunction was a "debt" or "liability on a claim" under the Bankruptcy Code. *Id.* at 276-77. Affirming the holdings of the lower courts, this Court held that because the debtor had been dispossessed of the property and the only thing that Ohio sought from him was the money to defray cleanup costs, the cleanup order had essentially been converted into a monetary obligation. *Id.* at 282-83. Accordingly, this

Court held, the injunctive order was a "claim" that was dischargeable in bankruptcy. *Id.*

In sum, Petitioner's attempt to fashion a "split" of authority between *Continental II* and decisions of this Court and the Fifth Circuit is nothing more than an attempt to reargue its 1997 petition. That petition did not warrant review by this Court then, nor should it now.

THIS CASE IS NOT OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO REQUIRE IMMEDIATE REVIEW BY THIS COURT

The Pilots also seek to invoke the jurisdiction of this Court by claiming that the case is of such imperative public importance as to justify immediate determination by this Court. The Pilots have not shown, nor can they, that this case meets that standard.

In their zealousness to prompt this Court into action, the Pilots mischaracterize the holding of *Continental II*. *Continental II* does not stand for the proposition, as the Pilots contend, that rights under an unrejected collective bargaining agreement are automatically reduced to a dischargeable claim in bankruptcy. Rather, *Continental II* merely interpreted *Continental I*, which stands for the proposition that if you file a proof of claim in a bankruptcy proceeding, and ask for equitable relief under a collective bargaining agreement, your claim, in certain circumstances, may be treated as a "claim" in bankruptcy giving rise to a right of payment.

The Pilots' argument that the determination of its claims violated section 1113 of the Bankruptcy Code is also based on a fundamentally wrong premise. The Pilots'

rights under the collective bargaining agreement were never altered or "extinguished." The Bankruptcy Court merely converted their request for specific performance from an equitable remedy to a monetary remedy. No provision or section of the collective bargaining agreement was changed. Indeed, under the Third Circuit's holding, Continental remains bound to arbitrate the seniority issue before the arbitrator in accordance with the collective bargaining agreement.

As in their previous petition, the Pilots continue to labor under the false belief that the Third Circuit impermissibly interpreted the collective bargaining agreement. In *Continental I* and *Continental II*, the Third Circuit interpreted the law as it applied to the LPPs, not the LPPs themselves. On neither occasion did the court "interpret" the labor protection provisions, as that term is used in labor law. *See Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 306-07 (1989) (any dispute involving the interpretation of a collective bargaining agreement must be submitted to and resolved by arbitration). In fact, the *Continental I* court expressly acknowledged the distinction between interpreting the collective bargaining agreements and interpreting how the Bankruptcy Code affects the collective bargaining agreements:

> We discern no inconsistency between the bankruptcy court's exercise of jurisdiction to determine the status of the bankruptcy claim and the district court's characterization of the issue of the Claimant's standing under the LPPs as a "minor" dispute. The bankruptcy court's ruling related only to the manner in which the Claimants' claims in bankruptcy would be treated if a right to seniority integration were established. This ruling, unlike the standing issue, does not turn

> on an interpretation of the LPPs. (Pet. App. 71a-72a n.8).

The Third Circuit was undoubtedly aware of the language used by the *Continental I* court when it decided *Continental II*, and implying otherwise would be incredible.

Moreover, arguing that the *Continental II* court impermissibly interpreted the labor protective provisions takes the appellate court's words out of context. Granted, the *Continental II* court noted that instead of modifying or rejecting the labor protection provisions, the *Continental I* court interpreted them. (Pet. App. 7a). However, to isolate that statement and allege that *Continental II* must be reviewed is misleading.

The *Continental II* court, similar to the court in *Continental I*, interpreted and applied *bankruptcy law* to the labor protective provisions. The transcript of oral argument indicates that the Third Circuit used the word "interpret" to describe what happens to a collective bargaining agreement in a bankruptcy case:

> JUDGE BARRY: Once we dispose of your [argument under section 1113] . . . your quarrel is not whether [the collective bargaining agreement] was rejected. Your quarrel was [the *Continental I* Court's] interpretation of the collective bargaining agreement.
>
> MS FLOWE: With all due respect, your honor, under the Railway Labor Act, this Court didn't have the authority to interpret that collective bargaining agreement. That is a minor dispute that is reserved for an arbitrator under that statute. Is it true that the court –

> JUDGE BARRY: Just a minute now, are you saying that the bankruptcy judge did not have the authority to say that we are reducing your claim for injunctive relief to a claim for money damages?

In re Continental Airlines, No. 00-3505, Transcript of Oral Argument (3d Cir. Dec. 11, 2001), at 9:23-11:8 (Resp. Pet. 28). In that exchange, the *Continental II* court was addressing whether the Pilots' counsel understood the issue before the court as being whether or not the *Continental I* court correctly interpreted bankruptcy law as allowing for the substitution of money damages for specific performance. The Third Circuit plainly was not using the word "interpret" as a labor law term of art. While aggressive advocacy has its place, EPMC's argument over the Third Circuit's use of the word "interpret" stretches the limits of permissible advocacy.

The Pilots' allegation that the Third Circuit – and especially Delaware – has developed a reputation as a refuge for corporate debtors, which according to the Pilots will only increase if *Continental II* is upheld, merits only a cursory response. In the five years since *Continental I* was decided, Continental is not aware of a single case filed in Delaware that involved debtors seeking to rid themselves of onerous collective bargaining agreements using the strategy EPMC fears *Continental I* created. If there have been such cases, EPMC did not cite them in its Petition.

EPMC also relies on a law review article that purports to disparage the effectiveness of the Delaware and New York Bankruptcy Courts. LoPucki, L. and Kalin, S., *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom"*, 54 Vand. L. Rev. 231 (2001). Not surprisingly, for every

one-sided article that is published, there is always an article that takes a different position. This case is no different. For instance, the law review that published LoPucki and Kalin's article published an article at the same time that was complimentary to the Delaware Bankruptcy Court. Skeel, D., *What's So Bad About Delaware?*, 54 Vand. L. Rev. 309 (2001). Regardless of which article may be more accurate, neither bears upon the Third Circuit's interpretation of bankruptcy law relating to collective bargaining agreements.

Finally, the Pilots provide this Court with a "simple example" to illustrate the effect of the decisions below. The example they use, however, is inapposite to the facts in the case at bar. The Pilots, for instance, assert that this case will allow reorganizing debtors to rid themselves of highly paid employees by refusing to reinstate employees in compliance with seniority provisions of a labor agreement. Petition at 25. In this case, however, the unique facts involve claims that were filed by former Eastern Pilots alleging that they should be *instated*, not *reinstated*. Moreover, Continental's relationship with the Pilots derives from a collective bargaining agreement between the Pilots and Eastern, not between Continental and the Pilots. That agreement, moreover, has no longevity in the lives of Continental and the Pilots after the question regarding whether or not Continental merged with Eastern is answered. This unique set of facts is unlikely to be often repeated.

CONCLUSION

For the foregoing reasons, Continental respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

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Dated: August 9, 2000

No. _____

In The
Supreme Court of the United States
October Term, 1997

IN RE: CONTINENTAL AIRLINES,

Debtor,

LPP CLAIMANTS,

Petitioners,

against

CONTINENTAL AIRLINES,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether The Third Circuit's Opinion Which Authorizes The Debtor To Unilaterally Alter Or Terminate The Labor Protective Provisions Of A Collective Bargaining Agreement Under Circumstances Where 11 U.S.C. § 1113 Was Not Complied With Violates The Mandate Of Congress And Is In Direct Conflict With Decisions Of The Second And Sixth Circuit Courts Of Appeal.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT BELOW

LPP Claimants, Petitioners

The names of the individual LPP Claimants are listed in Appendix F.

Continental Airlines, Debtor

Effective Date Committee

Honorable John Stonitsch, Trustee

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BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 1254(1) of Title 28, *United States Code* to review by writ of certiorari the judgment and opinion of the United States Court of Appeals for the Third Circuit dated August 29, 1997, (App. A at page App. 1), rehearing denied September 23, 1997, (App. B at page App. 43), affirming a judgment of the United States District Court for the District of Delaware entered on November 29, 1995, which affirmed a final order of the United States Bankruptcy Court for the District of Delaware rendered in April 16, 1993. This petition has been filed within 90 days of the

denial of rehearing as required by Supreme Court Rule 13.1.

STATUTES INVOLVED IN THE CASE

Section 1113 of Title 28, *United States Code*, which is involved in this case, provides:

> **§ 1113. Rejection of collective bargaining agreements**
>
> **(a)** The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
>
> **(b)(1)** Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall –
>
> > **(A)** make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that –

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such

extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such

interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

STATEMENT OF THE CASE

On February 23, 1986, Eastern Air Lines and its pilots' union ratified a collective bargaining agreement. (App. A at page App. 5.)

The collective bargaining agreement included sections 2(a), 3 and 13 of the Allegheny-Mohawk Labor Protective Provisions (LPPs). (App. A at pages App. 5-6; App. E at pages App. 87-88, App. 99.)

The LPPs provide for protection of the seniority rights of Eastern pilots "in the event of a merger between Eastern and another airline [] through the integration of Eastern's seniority list with the merging carrier's seniority list." (App. A at page App. 6.)

Texas Air Corporation, the parent of Continental, acquired Eastern on February 24, 1986. (App. A at pages App. 5-6.)

The union, on the basis that Texas Air's acquisition constitutes a merger within the meaning of the LPPs, requested a meeting with Eastern, Continental and Texas Air to integrate Eastern and Continental's seniority lists. (App. A at page App. 6.)

Eastern and Continental refused to meet. (App. A at page App. 7.)

The union initiated arbitration proceedings before the National Mediation Board to compel Eastern and Continental to integrate their seniority lists because of the carriers' merger. (App. A at page App. 7.)

Eastern filed bankruptcy in March, 1989, and refused, with the approval of the bankruptcy court, to submit to the National Mediation Board arbitration, relying on the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362. (App. A at page App. 7.)

The union appealed, the district court reversed and the Second Circuit Court of Appeals affirmed in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2nd Cir. 1990), ordering Eastern to arbitration and holding that "other provisions of the Bankruptcy Code *are inoperable* to the extent that they allow a debtor to bypass the requirements of section 1113."

In addition to Eastern's refusal to arbitrate, the airline and the union disputed the substantive meaning of a handwritten portion of the collective bargaining agreement which included the LPPs.

Unable to reach agreement, the union "filed a grievance with the Eastern Air Lines Pilots System Board of Adjustment, the arbitral panel responsible under the RLA [sic: Railway Labor Act] for adjudicating disputes arising out of the labor contracts between Eastern and its pilots." *Eastern Air Lines, Inc. v. Air Line Pilots Association, International*, 861 F.2d 1546, 1548 (11th Cir. 1988).

Following litigation initiated by the airline which sought to avoid the arbitration, the Eleventh Circuit Court

of Appeals directed that "The SBA [sic: System Board of Adjustment] will be charged with determining the contours of the disputed provisions." *Id.* at 1555.

Subsequently, the System Board ruled that monetary damages in lieu of jobs was not a remedy under the collective bargaining agreement, that "the heart" of the labor protective provisions was seniority integration and that "the board should not issue any award . . . which is not definitely intended and calculated to recognize meaningful LPP protection for pilots as a matter of contractual right under the February 23, Agreement." *L. D. Schulte Grievance, Eastern Air Lines System Board of Adjustment*, ALPA Case No. 1-86 (App. D at page App. 82.)

The LPP arbitration proceedings commenced, however now Continental, which had filed Chapter 11 bankruptcy proceedings, advised the arbitrator, *after* the Second Circuit ruled on the identical issue asserted by Eastern, that it would not participate because of the automatic stay provision. (App. A at page App. 8.)

The arbitrator rejected Continental's position and, in August, 1992, issued a decision based upon the Second Circuit's ruling in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, that he had jurisdiction. (App. A at pages App. 8-9.)

This action subsequently commenced as an adversary proceeding pursuant to 11 U.S.C. § 502, 28 U.S.C. § 1334(b), from a civil proceeding arising under the Bankruptcy Code, and arising in and related to Continental Airlines' Chapter 11 proceedings, wherein Continental sought to avoid its duty to arbitrate the LPP claims. (App. A at page App. 9.)

On April 16, 1993, the Delaware bankruptcy judge entered an order confirming Continental's Joint Second Plan of Reorganization permanently enjoining any arbitration involving the LPPs, (App. A at page App. 38), determining that "the equitable remedy of seniority integration constituted a 'claim' within the meaning of § 101(5) of the bankruptcy code" and that "the remedy could be converted to an award of money damages" as a "general, dischargeable, unsecured claim that was entitled to no administrative priority." (App. A at page App. 11.)

The LPP claimants appealed to the District Court pursuant to 28 U.S.C. § 158(a)(1) which reversed the injunction and required Continental but affirmed the rendition of the LPP claim into money, opining that "the right to arbitrate the LPP dispute may be of limited practicable utility to the LPP Claimants. Any award that might be granted by the arbitrator would be an unsecured pre-petition claim and may come after the assets of the bankruptcy estate have been wholly depleted." (Excerpt from *In re Continental Airlines, et al.,* No. 93-163 (D. Del. Nov. 29, 1995); (App. C at pages App. 47-48, n. 31.)

The Petitioners then appealed to the Third Circuit pursuant to 28 U.S.C. § 158(d), which issued its judgment and opinion August 29, 1997, affirming the district court "in all respects." (App. A at page App. 42.) Rehearing was denied September 23, 1997. (App. B at page App. 43.)

REASONS FOR GRANTING THE WRIT

The Third Circuit's Opinion Which Authorizes The Debtor To Unilaterally Alter Or Terminate The Labor Protective Provisions Of A Collective Bargaining Agreement Under Circumstances Where 11 U.S.C. § 1113 Was Not Complied With Violates The Mandate Of Congress And Is In Direct Conflict With Decisions Of The Second And Sixth Circuit Courts Of Appeal

The Third Circuit's decision requires review as a matter of great importance as it directly violates the Congressional mandate of 11 U.S.C. Section 1113(f) (1988):

> **No provision of [the Bankruptcy Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of [section 1113].**

Under circumstances where the Third Circuit recognized that "Continental's failure to reject the collective bargaining agreement consistent with the mandate of section 1113 of the Code renders the injunction [preventing Continental from being required to participate in National Mediation Board labor arbitration proceedings regarding enforcement of the labor protective provisions of the collective bargaining agreement] invalid," (App. A at page App. 38), the Third Circuit nonetheless authorized the bankruptcy court to alter and, in effect, terminate the collective bargaining agreement by holding that "any claim based on an award of seniority integration arising

out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment." (App. A at page App. 36.)

By so ruling, the Third Circuit is also in direct conflict with decisions of the Second Circuit and the Sixth Circuit in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2nd Cir. 1990)[1] and *In re Unimet Corp.*, 842 F.2d 879 (6th Cir.), *cert. denied*, 488 U.S. 828 (1988).[2]

The Second Circuit, finding that "Section 1113 was enacted as the legislative response to the Supreme Court's decision in *Bildisco*" which was "representative of the ill that Congress sought to cure," concluded:

> **Subsection 1113(f) evinces an intent that other provisions of the Bankruptcy Code *are inoperable* to the extent that they allow a debtor to bypass the requirements of section 1113.**

In re Ionosphere Clubs, Inc., 922 F.2d at 989.

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[1] *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, which required Eastern Air Lines to arbitrate whether it had been merged with Continental Airlines and, if so, to determine how the LPP Claimants are to be integrated into Continental's pilot work force, is particularly relevant as the Third Circuit's conflicting decision concerns the identical collective bargaining agreement, subject matter and parties.

[2] In *In re Unimet*, 842 F.3d at 885, which concludes that "Congress intended [1113] to give broad protection to collectively bargained for rights which are threatened by a corporate reorganization," the Sixth Circuit rejected arguments that another section of the Bankruptcy Code could be utilized to reject the claim and that Section 1113 must be narrowly interpreted.

Moreover,

> **[t]he language of the statute indicates that Congress intended Section 1113 to be the sole method by which a debtor could terminate or modify a collective bargaining agreement and that application of other provisions of the Bankruptcy Code that allow a debtor to bypass the requirements of Section 1113 *are prohibited.***

Id. at 989-990 (emphasis supplied).

Here, the Third Circuit's decision premised on the theory that "substitution of the equitable remedy in no way amounts to an alteration or termination of the terms of the collective bargaining agreement," (App. A at page App. 40 n. 15), is in direct conflict with the Second Circuit's decision in *In re Ionosphere Clubs, Inc.*, 922 F.2d at 989-990 and the Sixth Circuit's decision in *In re Unimet Corp.*, 842 F.2d 879, 884 (6th Cir.), *cert. denied*, 488 U.S. 828 (1988) holding that:

> Section 1113 prohibits the employer from *unilaterally* modifying *any provision* of the collective bargaining agreement.

The scope of the subject collective bargaining agreement was to be determined by the Eastern System Board of Adjustments in *L. D. Schulte Grievance, Eastern Air Lines System Board of Adjustment,* ALPA Case No. 1-86 (App. D commencing at page App. 49), pursuant to the order of the Eleventh Circuit Court of Appeals in *Eastern Air Lines, Inc. v. Air Line Pilots Association, International*, 861 F.2d 1546, 1555 (11th Cir. 1988).

"ALPA filed a grievance with the Eastern System Board of Adjustments, the body established to hear and

determine disputes concerning the collective bargaining agreement." *In re Ionosphere Clubs, Inc.*, 922 F.2d at 987.

The System Board considered Eastern's position that the collective bargaining agreement "provides LPP protection for pilots only as specified in Sections 3 and 13 of the Allegheny-Mohawk LPP's" and ALPA's position that the LPP's "incorporates the full package of Allegheny-Mohawk LPP's" or "all of the protections of the TWA LPP's."[3] *L. D Schulte Grievance*, (App. D at page App. 55.)

Included in the "full package" was Section 7 of the LPPs which provides for ***"lump sum [] separation allowance[s]" in lieu of a job***. (App. E, LPP Section 7 at page App. 94.)

In rendering its decision, ***the System Board eliminated monetary damages as a remedy under the LPPs in the collective bargaining agreement***.

The record in this case does not justify any conclusion "that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's." *L. D. Schulte Grievance*, (App. D at page App. 72.)

Thus,

> . . . the evidence in the present case does not sustain ALPA's contention that the pecuniary allowances provided in the Allegheny-Mohawk

[3] There are 13 sections in the labor protective provisions of the Allegheny-Mohawk LPPs (App. E). All, excepting the right to seniority integration, the application date of benefits and the protection of jobs in the same class, craft and field of endeavor provide for money payments.

> LPP's may be asserted, in addition to the protection of Sections 3 and 13, as a matter of contractual right by Eastern's pilots.[4]

L. D. Schulte Grievance, (App. D at page App. 79.)

Accordingly, ignoring the fact that the Eleventh Circuit held that the System Board's determination of the "contours of the disputed provisions; by the SBA would be binding on the airline and the union, *Eastern Air Lines, Inc.*, 861 F.2d at 1555, the Third Circuit's ruling that "monetary payment is an alternative for the equitable remedy of seniority integration," (App. A at page App. 29), impermissibly altered the collective bargaining agreement which expressly excluded ***"lump sum*** [] ***separation allowance[s]" in lieu of a job***. (App. E, LPP Section 7 at page App. 94.)

Moreover, in authorizing "lump sum [] separation allowance[s]," *id.*, in lieu of jobs by holding that "the right to seniority integration gives rise to a 'right of payment' such that the remedy constitutes a 'claim' dischargeable in bankruptcy" (App. A at page App. 36), the Third Circuit has violated the directive of Congress which prohibits application of **"other provisions of the Bankruptcy Code" in order to "allow a debtor to bypass the requirements of Section 1113."** *In re Ionosphere Clubs, Inc.*, 922 F.2d at 990.

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[4] The Third Circuit mistakenly relies on section 1 of the LPPs to conclude that "monetary damages is consistent with the articulated scope and purpose and is therefore appropriate." Section 1 – and monetary damages – pursuant to the System Board decision are not part of the subject collective bargaining agreement. (App. A at page App. 28 n. 12).

Accordingly, the Third Circuit's express reliance on 11 U.S.C. § 101(5) to alter the right to seniority integration provided for in the collective bargaining agreement into a "claim" which "gives rise to a right of payment" (App. A at page App. 25), directly conflicts with the Second Circuit's holding in *In re Ionosphere Clubs, Inc.*, 922 F.2d at 989, that **"Subsection 1113(f) evinces an intent that other provisions of the Bankruptcy Code *are inoperable* to the extent that they allow a debtor to bypass the requirements of section 1113."**

The decision likewise conflicts with the Sixth Circuit's determination in *In re Unimet Corp.*, 842 F.2d at 884, that Section 1113 does not yield to 11 U.S.C. § 503(b) for purposes of determining whether qualification as an administrative expense is necessary for the union to prevail.

> . . . section 1113 unequivocally prohibits the employer from *unilaterally* modifying *any provision* of the collective bargaining agreement. Accordingly, we hold that Unimet cannot escape its obligations in this regard merely because the requirements of section 503 have not been satisfied.

Indeed, the effect of the Third Circuit's ruling is to impermissibly eviscerate the collective bargaining agreement.

The System Board held that "Sections 3 and 13 are the heart of the Allegheny-Mohawk LPP's because they control seniority:"

> **. . . even without the pecuniary allowances, as desirable as they may be, the protection of *seniority integration itself* by application**

> **of Sections 3 and 13 *is of such critical importance that this without more does constitute meaningful protection* under the February 23 Agreement.**

L. D. Schulte Grievance, (App. D at page App. 79 (emphasis supplied).)

Accordingly, the System Board concluded that it "should not issue any award in this case which is not definitely intended and calculated to recognize meaningful LPP protection for pilots as a matter of contractual right under the February 23 Agreement." *L. D. Schulte Grievance*, (App. D at page App. 82.)

The Third Circuit's ruling, "in the absence of Continental's compliance with the requirements to reject the collective bargaining agreement" (App. A at page App. 40), which terminates the critically important meaningful protection of seniority integration provided under the express terms of the collective bargaining agreement and substitutes a general unsecured pre-petition claim in bankruptcy, impermissibly acts to "nullify effectively the arbitration clause in the collective bargaining agreement and would substitute the court's judgment for that of the arbitrator." *In re Ionosphere Clubs, Inc.*, 922 F.2d at 992.

Finally, the Third Circuit, opining as a finder of fact, justifies its approval of the unilateral alteration of the collective bargaining agreement because seniority integration "has the potential to create an environment rife with hostility and low employee morale, not to mention a detrimental effect on employer-employee relations" which "circumstances indicate that seniority integration would not be a feasible remedy and that an alternative remedy of

monetary damages would be appropriate." (App. A at pages App. 35-36).

First, Continental Airlines contracted for and agreed to the LPPs which the Third Circuit worries over. Moreover, Continental elected not to alter or terminate the collective bargaining agreement providing for seniority integration under Section 1113 and, indeed, contracted for and is bound by the LPPs irrespective of the Third Circuit's perceptions about what may or may not happen if Continental is required to honor its contract. As the decision notes:

> Throughout this litigation, Continental has premised its arguments on the assumption that it is bound by the LPPs and has a duty to arbitrate the LPP dispute . . . **In light of the overwhelming advantage that continental derived from maintaining the position that is was bound by the collective bargaining agreement**, and thus, had a duty to arbitrate the LPP dispute, **we refuse to allow Continental to repudiate that representation** and return to the district court to litigate the issue whether it is bound by the agreement.

(App. A at page App. 41 (emphasis supplied).)

Section 1113 simply does not allow the court, sua sponte, to strike out Continental's contractual obligation on the supposition that strife might result if the agreement were enforced.

Second, as the Second Circuit observed in *In re Ionosphere Clubs, Inc.*, 922 F.2d at 992, in direct conflict with the Third Circuit's worry: **"if the Trustee believes that the threat of slowdowns or other disturbance is**

such that he wishes to undo the arbitration award, he has open to him either a return to the arbitrator or a rejection of the contract in the manner congress prescribed in 11 U.S.C. Section 1113." Congress provided a remedy for the Third Circuit's concern; one which Continental elected not to avail itself of when it did not seek to alter or terminate the collective bargaining agreement.

Third, "**the debtor in possession or trustee has the contractual duty to adhere to the substantive provisions of the agreement** . . . " *In re Ionosphere Clubs, Inc.*, 922 F.2d at 992.

The Third Circuit's ruling authorizes Continental to ignore the "substantive provisions of the agreement" by removing "the heart of the Allegheny-Mohawk LPP's" which "control seniority" from the collective bargaining agreement. *L. D. Schulte Grievance*, (App. D at page App. 80.)

Finally, the impact of the Third Circuit's ruling is the impermissible termination of the collective bargaining agreement.

The right to seniority integration through enforcement of the labor protective provisions of the collective bargaining agreement accepted by Continental Airlines will provide jobs to pilots whose airline merged with Continental.

Transforming the jobs protected as a result of the merger through operation of the terms of the collective bargaining agreement into a money damages claim in the bankruptcy effectively destroys the collective bargaining

agreement itself as no employees covered by the agreement will have the right to a job. As such, the decision requires reversal:

> **"We conclude, from the language of the statute, statements made by the sponsors of the legislation, and the context in which it was enacted, that Congress intended that a collective bargaining agreement remain in effect and that the collective bargaining process continue after the filing of a bankruptcy petition unless and until the debtor complies with the provisions of section 1113."**

In re Ionosphere Clubs, Inc., 922 F.2d at 992.

The Third Circuit's decision in violation of the mandate of Congress and in clear conflict with the rulings of the Second and Sixth Circuits, operates to unilaterally terminate the collective bargaining process. Accordingly, this Court should grant certiorari.

Dated: December 19, 1997

Respectfully submitted,

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APPENDIX A

In re Continental Airlines, 125 F.3d 120 (3rd Cir. 1997)

[1] No. 00-3505

IN RE: CONTINENTAL AIRLINES,

Debtor,.

EASTERN PILOTS MERGER COMMITTEE,

Appellant

v

CONTINENTAL AIRLINES

PATRICIA A. STALANO, Trustee

[2] MS. FLOWE: If it please the court, my name is Carol Connor Flowe and I represent the appellant, the Eastern Pilots Merger Committee, and I would like to reserve three minutes for rebuttal, please.

THE COURT: Granted.

MS. FLOWE: If the lower court and Continental are correct in their interpretation of Judge Lewis's 1998 decision, which your honor just referred to implicitly as Continental I, that decision is contrary to the law under both sections 11-13 and 365 of the Bankruptcy Code.

Now we acknowledge that Judge Lewis's decision is ambiguous, but we believe that it reasonably lends itself to an interpretation that is consistent with those statutory provisions.

THE COURT: Let me move beyond for a moment those sections that you have just identified and throw out for you what I see to be the issue in the case.

We will assume for argument purposes that the LLPs continue to bind Continental [3] as you argue.

In what way has Continental's post-confirmation conduct violated those provisions in ways that its pre-confirmation conduct did not?

MS. FLOWE: Your honor, I don't believe that they violated it in any different way. They have continued to refuse to comply with those provisions.

THE COURT: Can I ask a stupid question but for my own enlightenment. Where are these pilots now? Where have they been since 1993? Are they working for any airline? What are they doing?

MS. FLOWE: In a great number of places, your honor. Some of them are flying for other carriers. Perhaps even a few of them are even flying for Continental.

THE COURT: But not being paid as much as they think they are entitled to because of seniority?

MS. FLOWE: That's correct.

THE COURT: When did that claim arise? The right to integrate the seniority [4] roster occurred when?

MS. FLOWE: The pilots' position has been that the merger, if you will, that was necessary to trigger these rights occurred over a period of time, from the time that Texas Air acquired Eastern in 1986 and going forward over the next several years.

THE COURT: A merger is a merger.

THE COURT: When did the merger occur?

THE COURT: And there has been no finding of a merger yet.

MS. FLOWE: That is correct and that is an issue that will be –

THE COURT: Assuming a merger, it had to have been pre-petition.

MS. FLOWE: It would have been pre-petition. Most of the events would have occurred pre-petition, that's correct, your honor.

THE COURT: The merger. The merger. Without a merger, there are no LLPs to worry about. The merger occurred pre-petition.

MS. FLOWE: The provision actually [5] refers to merger, combination or several other synonymous kinds of words.

THE COURT: Whatever.

MS. FLOWE: Again, the decision has always been that those things took place, that there were a number of events that took place, that Texas Air basically cherry-picked the valuable assets of Eastern Airlines for the benefit of Continental.

That took place over some period of time and that those events taken together constituted the necessary triggering event to make those LLPs applicable.

THE COURT: What happened – I return to my first question, what happened postconfirmation? What was the new breach, for lack of a better phrase?

MS. FLOWE: Judge Barry, we believe that this is a continuing obligation, that each and every day, as Arbitrator Alcurry said, that nothing new happened. It is the same thing that happened every single day prepetition, and

every single day pre-postpetition and every single day [6] postconfirmation that Continental refused to comply.

THE COURT: A breach of the collective bargaining agreement, right?

MS. FLOWE: Yes, your honor.

THE COURT: Isn't there a limitations period for asserting a claim based on a breach of a CBA?

MS. FLOWE: There may well be a limitations period applicable, but because this matter was initiated right at the very outset when Continental and Eastern first refused to comply, the litigation has been pending ever since that time.

THE COURT: As I understand it, this collective bargaining agreement is still in effect, it flowed through that. But that gives rise to a right to arbitrate, right?

MS. FLOWE: That's correct.

THE COURT: And your people have declined to arbitrate; am I incorrect on that?

MS. FLOWE: They haven't declined to arbitrate, your honor. There was a dispute [7] that arose as to what was at issue in that arbitration, and so they put off arbitration while they tried to clarify that matter.

THE COURT: You mean when they went to a New Jersey court to get a declaratory judgement instead of arbitrating?

MS. FLOWE: Yes, that is correct, your honor.

THE COURT: But after February 2000, you weren't satisfied with the results on your pre-confirmation claim for seniority integration, and in February of 2000, you withdrew that claim and now seek the same seniority integration postconfirmation.

But you had your cure for that in the bankruptcy proceeding, and aren't you looking for a second remedy for the same breach?

MS. FLOWE: Our position, Judge Barry, is that all that was at issue in that bankruptcy proceeding, and in the 1997 decision of this court, was the bankruptcy claims, the claims for the breach of that, of those labor protective provisions, up [8] until the date of confirmation.

THE COURT: Ms. Flowe, isn't that position you're assuming now somewhat different from the position that your clients took in Continental I?

And we have the questioning of counsel by the panel Jack Michelle, Judge Michelle, and even in your petition for certiorari to the United States Supreme Court, throughout your position, you were not limiting yourself to pre-petition. You said over and over again that this was a basic career emolument they sought.

How do you respond to that?

MS. FLOWE: Your honor, there certainly are statements that could be construed that way that were made by our client's former attorneys. We can only speculate as to what they had mind, but our best speculation –

THE COURT: What they had in mind was really adjudicated by our court in the argument, in the dialogue,

and the briefs and your oral argument and your petition for [9] certiorari.

MS. FLOWE: Those documents did also acknowledge the ambiguities in the decision. We can only assume that they were trying to clarify that decision in a way that the pilots subsequently tried to do that.

THE COURT: While I have you, your argument that there wasn't a rejection of the contract, suppose we hold that, yes, there wasn't a rejection, but that all that the previous decision of our court was was an interpretation of a collective bargaining agreement and that the collective bargaining is still viable.

Once we dispose of your, what I considered a major argument in your brief about Continental did not follow the statutory requirements of rejection, once we say, rejection is irrelevant here because there wasn't any rejection, your quarrel is not whether it was rejected. Your quarrel was the interpretation of the collective bargaining agreement.

[10] MS. FLOWE: With all due respect, your honor, under the Railway Labor Act, this court didn't have the authority to interpret that collective bargaining agreement. That is a minor dispute that is reserved for an arbitrator under that statute.

It is true that the court –

THE COURT: Just a minute now, are you saying that the bankruptcy judge did not have the authority to say that we are reducing your claim for injective relief to a claim for money damages?

MS. FLOWE: Judge Lewis seemed to say otherwise in the former decision. We do think that his decision was limited to the bankruptcy claims, the treatment of claims in bankruptcy.

THE COURT: Just a minute please, this is important. I want you to answer my question.

MS. FLOWE: Yes.

THE COURT: Do you understand the question?

MS. FLOWE: Repeat it for me.

[11] THE COURT: Are you saying that the bankruptcy judge did not have the power to say, I am reducing your claims for injunctive relief to claims for money damages to be determined by an arbitrator?

Are you saying that the bankruptcy judges don't have that power?

MS. FLOWE: The bankruptcy judge did not have the power to dictate –

THE COURT: Where do you say that in your brief?

MS. FLOWE: I don't believe we said that in our brief because even the 1997 decision of this court –

THE COURT: My follow-up question is, you just made that statement that the court had no power under the Railway Labor Act.

MS. FLOWE: To interpret the collective bargaining agreement, which I don't think that Judge Lewis was purporting to do in 1997. Rather I think what he was saying was that once an arbitrator had ruled on an appropriate

remedy which was within the province of the arbitrator, that a [12] bankruptcy judge could appropriately take that award and remedy and convert it into a money damages claim if a claim were appropriate in the bankruptcy.

THE COURT: If the bankruptcy judge had determined in advance that a money damage claim would be appropriate, and Judge Lewis said that that was correct and that the arbitrator could then award if there were to be a money award. I think you have it reversed.

MS. FLOWE: I didn't read it that way, your honor, but I will certainly accept that.

As we have argued, however, because if the decision is interpreted to eliminate these pilots postconfirmation rights, it is so clearly inconsistent with section 11-13 and section 365.

THE COURT: Let's go back to my first question. Let's assume, and you are talking about 11-13, let's assume that the LLPs pass through I am willing to assume that for purposes of argument. What I don't [13] understand though is, how there can be two remedies for the same breach.

Let me give you a hypothetical and you tell me how this case differs from my hypothetical.

A and B have a contract to plow B's driveway when it snows. One evening it snows. The next morning A does not plow B's driveway. B files suit for breach of contract and looks for a specific performance. The same day the court decides no specific performance. I am going to give you money damages. B has been made whole and the contract between A and B is still effective.

But that afternoon, B's driveway is still covered with snow and he goes back into court after A refuse to plow the driveway, files another action for breach, that action is barred. It hasn't snowed again.

The snow on the ground is the same snow from earlier in the day. The condition precedent to performance has not been [14] satisfied.

Where has there been any satisfaction of a condition precedent postconfirmation?

Has there been another merger of Continental?

THE COURT: It hasn't snowed again after confirmation.

MS. FLOWE: In your honor's example, the terms of the contract were such was that there was a singular obligation.

As your honor described in the hypothetical, there was not a continuing obligation, a new obligation each and every day the contract was in place.

THE COURT: Where was there a continuing obligation here? There is an obligation, if merger or the other requisites too, consistent with fairness, do a seniority integration.

MS. FLOWE: There are two places where this comes from in our argument; number one, as Arbitrator Alcurry in interpreting this very provision of this collective bargaining agreement stated explicitly that it was a [15] continuing obligation and that each day that Continental or Eastern. in that case, failed to comply with it, it gave

rise to a new grievance on the part of the pilots, that is number one.

And number two, it is the only way to give section 11-13 any effect if one didn't –

THE COURT: You keep slipping back into 11-13. I will assume that 11-13 applies and that provision, the LLPs have passed through, assuming a merger. You don't need 11-13. It is irrelevant. We have the LLP provision.

THE COURT: They couldn't change the wage scale because they didn't comply with 11-13 so that there is some benefit to the pass-through.

THE COURT: I made that point earlier that I think that this whole argument of rejection is irrelevant here because the basic, I think the basic question is whether the claim you are making now was subsumed in the claim you made in your appeal from the [16] reorganization plan, which this court adjudicated, and the question is, did that diffusion take care of pre and postconfirmation activity.

MS. FLOWE: And your honor, we think it could not for the reasons that once Continental survived its plan of reorganization without having rejected the collective bargaining agreement, it assumed it by operation of law.

Once it assumed it, it assumed all of it.

THE COURT: Say that again. I missed that.

MS. FLOWE: Once confirmation took place without a rejection, they could no longer reject. And under this court's authority, they therefore assumed by operation

of law, and the Supreme Court has said, when you assume an executory contract, you have to assume all of it.

At that point there is no longer a claim for a breach. The claim disappears. There is either, in the case of an actual [17] assumption, a right to a cure for that violation of the contract or, if instead you have the view of some of the other courts of appeals that it doesn't get actually assumed but it actually rides through, then the claim in bankruptcy disappears altogether.

The creditor in the matter of the bankruptcy law no longer has a claim at that juncture.

THE COURT: I understand your position.

THE COURT: I have one final question. And we will hear you again in rebuttal.

You say in your reply brief that there should be prompt arbitration so that it could be determined whether the "requisite events" have occurred to require seniority integration.

What are the requisite events that the arbitrators should look for?

MS. FLOWE: That was a reference to these various merger, combination and so forth terms that are used in the provision [18] to see whether or not there is one of those things.

THE COURT: Thank you.

MR. PATTON: May I please the court, Jim Patton for the appellee Continental.

Your honor, I am here principally to answer your questions, and I had planned to begin with what the appellants believed was their strongest argument and work through that, and that's the argument that your honors did not want to hear about. But if I may, let me focus –

THE COURT: If we only listened to arguments that we wanted to hear, we would hear very few arguments.

MR. PATTON: At the outset, let me just state that from our point of view we think that the opinion is anything but ambiguous.

And what this really turns on is a question of whether or not there is a basis hear for reconsideration. But the appellants' strongest argument they have asserted in their papers, and as counsel [19] argued here, is that in their view the decision of the court's below on this appeal so misread the opinion as to make it inconsistent with the bankruptcy code provisions 11-13 and section 365,and that therefore that reading was absurd.

I want to take just a minute to address that argument and explain why in our view the opinions were, in fact, consistent with the reading of this court's earlier decision in Continental I, and, in fact, is consistent with this court's earlier decisions in, for example, Roth.

The EMPC's argument essentially depends on three steps all being satisfied. First, the EMPC contends that a failure to reject under section 11-3 is the same as an assumption and that there is no other option; that is, a failure to reject is of necessity an assumption.

Step two, that assumption is, of necessity, an assumption that must play by the rules of section 365 of the bankruptcy code and that there is no other option.

[20] And number three, that under the rules of section 365, the obligations to cure pre-petition default are of necessity obligations of the reorganized debtor.

There are flaws with each of those assumptions. I will state this at the outset that they do have a case that they are somewhat in the camp, and that is the venture resources case out of the Fourth Circuit. I will get to that in just a moment.

This is the best case they have got. It was decided after this court's earlier decision, and I will point out that it was roundly criticized in the Family Snacks case out of the Eighth Circuit Bankruptcy Appellant Panel for, in the view of that appellant panel, misreading section 365 of the bankruptcy code and how it works.

So let's focus first on what the law is in this circuit because I think that's the correct starting place for analysis.

Prior to this court's decision in Continental I, this court decided Roth. In [21] Roth the court faced a collective bargaining agreement, contemplated what happens when section 11-13 is not complied with, said that that is an assumption, but went on to describe the consequences of that event in a way that made it clear that that assumption was not an assumption that led to the requirement that section 365 be complied with.

In fact, what the court concluded was that the bankruptcy court below is perfectly correct in deciding how to

treat specific claims arising in connection with prebankruptcy breaches under the collective bargaining agreement and in deciding that some of those claims would be unsecured claims, general unsecured claims, and some would be priority claims and some would be administrative claims.

365, were it to be complied with, would require that all of those claims be cured and that all of those faults be cured and be converted into administrative claims.

[22] So Roth states a position and a result that is inconsistent with the proposition that an assumption or a failure to reject under section 11-13 of necessity leads to a section 375 result.

Roth, by the way, is not alone. In the Family Snacks case, which is the most recent case to wrestle with this issue, the court, in that case the Eighth Circuit Bankruptcy Appellant Panel, took a look at the state of the law and observed there had been something of a split that has developed in the circuits about what happens when you have a collective bargaining agreement that is neither assumed or rejected, but simply exists after the bankruptcy case.

And in particular, what happens to the claims associated with prebankruptcy defaults under that collective bargaining agreement. And the Family Snacks court observed that the prebankruptcy default that arose under the not assumed, not rejected collective bargaining agreement are treated by the majority of the courts as conventional [23] claims just the way that Roth did.

In fact, Family Snacks, as I mentioned, talks about Roth and explains that the Roth case, when it talks about

a collective bargaining agreement being assumed if it was not rejected under 11-13, was not talking about a 365 assumption. And the Family Snacks case points out that the Roth decision and the other courts' decisions that are in that same family of cases looked independently at the claims arising under the collective bargaining agreement, addressed those claims as prebankruptcy claims just as this court did in Continental I.

We had a prebankruptcy default arguably. This court concluded that gave rise to a claim because the bankruptcy court reduced the injunctive rights to monetary damages and addressed how that claim should be treated.

THE COURT: The problem that I am wrestling with is, where there has already been a prebankruptcy cure, what is the [24] relevance of all of that law?

MS. FLOWE: That's my question too. I don't understand, your honor, I really don't understand why you are making that argument, counsel.

THE COURT: I think I have fallen into an appellant's trap.

MR. PATTON: You are correct. The Appellant has argued –

THE COURT: I will tell you why. Because you don't want us to say that that collective bargaining agreement was not rejected and it still rode through. You don't want us to say that. Although it would succeed in this particular claim, but as an aftermath of this case, you have other reasons for our not saying that, isn't that right?

MR. PATTON: Your honor, I think the answer is, no, I don't agree, and let me explain.

THE COURT: Let's see your position on whether it passes through. You concede in your brief that you had a duty to arbitrate, [25] had a duty to arbitrate preconfirmation claims.

MR. PATTON: That's correct.

THE COURT: Do you believe that there is a duty to arbitrate postconfirmation claims, if, indeed, there are any?

MR. PATTON: Yes. If, indeed, there are any, yes.

THE COURT: So that it passes through if that is true.

So why have the appellants felled a whole forest of trees?

MR. PATTON: The question is, what is the status of the prebankruptcy breach. That is the real question.

THE COURT: When you say prebankruptcy, are you talking about prepetition or preconfirmation?

MR. PATTON: Either one, both your honor. Because, and the reason why I started down this road, and as your honors would describe fell into the trap, is the appellants are creating the case for the proposition that, was the status of this [26] situation somehow inconsistent with the bankruptcy code and that, in fact, Roth is improperly decided.

And what I wanted to emphasize is that what Continental I did is perfectly consistent and, in fact, identical

with Roth and is perfectly consistent with the majority view when it comes to addressing what happens to –

THE COURT: Now that you have conceded, because I reread the brief a couple of times to see whether you were taking a position on whether you were bound to the CBA only through the bankruptcy proceedings, as you would have to say you were because we said so in Continental I, or whether you were also bound postconfirmation.

And you have now told me you are bound postconfirmation. We wouldn't even have to deal with whether Roth is rightly decided or whether it passed through or rode through or whether it was an implicit assumption or is an explicit assumption. It is all [27] irrelevant.

You agree the CBA has passed through and you are now bound by it. So I return to my first question: where is the new breach?

MR. PATTON: There is no new breach.

THE COURT: That is the question, for me anyway.

THE COURT: Before you get on to this, I am going to tell you how I look at this case. I am looking at this case in a very, with a very narrow focus. I see the issue, did Continental I adjudicate postconfirmation claims relating to this question of seniority.

That's how I see the issue in this case.

Do you agree?

MR. PATTON: Yes, your honor. And the answer to that question is, whether or not –

THE COURT: I thought the thrust of your brief was along those lines.

MR. PATTON: Yes, your honor.

[28] THE COURT: The thrust of your brief from page 21 where you talk about what was argued before the panel before, when you talk about the dialogue between the court and counsel for your friends, and what was contained in the petition for certiorari.

I thought that was a major point that you were making.

MR. PATTON: That's correct because the question – taking –

THE COURT: And also the language of our opinion in Continental I, what your friend says is ambiguous.

MR. PATTON: That's correct. I believe it is and I believe it resolved once and for all whether or not the pilots would be entitled to seniority integration specifically or whether or not they are entitled to damages.

What is being argued today is, is that a "continuing breach." That is, that until we have in fact integrated, there is a postconfirmation ongoing breach, and that is not the case.

[29] This court reduced the right to seniority integration and the bankruptcy court reduced the right to seniority integration to a claim. And it made it clear in its opinion that it is an either/or. You get one remedy or another and the claim is a substitution for specific performance.

THE COURT: I gather that in the original bankruptcy proceedings before the plan of reorganization was established, that there was no specific limitations of the claim, that your friends did not say, we are only making prepetition claims here.

MR. PATTON: That is correct. They made claims for – in fact, they specifically made claims for future loss associated with the integration.

THE COURT: That's what I understand, and my examination of the record indicates that.

THE COURT: How did the plan deal with these claims?

MR. PATTON: The plan treated them as [30] general unsecured claims and as a result treated them the same as all other general unsecured claims were treated.

THE COURT: How was that?

MR. PATTON: I believe all unsecured claims participated in distribution of the equity of the company, in effect, the unsecured creditors became the owners of Continental unsecured shares.

THE COURT: Got some shares of the stock.

MR. PATTON: Yes. And what's important about this distinction in terms of whether or not we are talking about a continuing breach and a postconfirmation breach, it is certainly not the case that it is our view that we are bound to the collective bargaining agreement if the interpretation is that there is a new breach everyday because; A. that is not what this court said in the first instance –

THE COURT: You are either bound or not bound. Whether or not there is a new breach everyday is a question of fact.

[31] MR. PATTON: Except, your honor, in the last Continental decision, the Continental decision I, at the very end there is a very interesting point of reference. There the court makes clear that it is not going to hear Continental's argument about whether it is bound by the collective bargaining agreement or whether or not 11-13 should apply because it is believed that Continental had specifically received substantial benefit by taking a contrary view.

And the specific benefit that it received was that all of these claims were trapped prepetition.

There is an interesting question. What would happen if this court were to reconsider that earlier decision.

THE COURT: Are you trying to weasel back and now say you are not going to really be bound. The only reason you were held bound was because you had done the bad things the court found you had done.

You are either bound or not bound on [32] the merits.

MR. PATTON: In my view, I am bound the way that the Third Circuit said I am bound earlier which is I have to arbitrate and I have to live up to the obligations that remain under the collective bargaining agreement.

But it was very clear about what that was a trade for. And it is the last two pages of the earlier opinion. In its view there was something of a trade going on because

Continental was trying to argue that there was no collective bargaining agreement, that it was not subject to 11-13, and this court said, no, stop.

THE COURT: If the court only found you bound by the CBA as a sanction, then it wasted a lot of pages of opinion prior to that point discussing the CBA, didn't it?

MR. PATTON: Well, it did need to address the specific question, and this is what most of the opinion was focused on, how to deal with that prebankruptcy claim, is it reducible to a claim in fact.

[33] THE COURT: If you weren't bound by CBA, by definition there is prebankruptcy claim.

That would have been the first issue the court would have decided, not the last.

MR. PATTON: Conceded.

THE COURT: Is there any continuing obligation under the collective bargaining agreement as to what was the term of the collective bargaining agreement; is that the same CBA that is in effect now for Continental employees?

MR. PATTON: No. The collective bargaining agreement that we are specifically focusing on is a collective bargaining agreement between Alpha and Eastern Airlines. And we are really focusing only on the labor protection provisions which obligated –

THE COURT: I know that's what you are focusing on, but were there other provisions which if you are bound by them, you are still bound by them?

For example, wage scale. Are Eastern [34] employees now working for Continental entitled to be paid according to the Eastern contracts, right?

MR. PATTON: No. They would be integrated into the Continental contract where a new collective bargaining agreement would govern.

THE COURT: And being bound by it relates only to that issue?

MR. PATTON: That's correct. It relates to the –

THE COURT: I am not sure that I understood your answer to Judge Fullam's question.

This provision of incorporating seniority after a merger, was that a separate agreement or was that a clause in the CBA?

THE COURT: It was section 3.

MR. PATTON: I beleve [sic] it was a specific clause of the CBA and Eastern and –

THE COURT: I go back to Judge Fullam's question. A collective bargaining [35] agreement is for a specific period of time.

I believe Judge Fullam asked you when did that end. I am not sure that I understood your answer.

MR. PATTON: With respect to the question, I did not answer because I got off on the question of whose collective bargaining agreement was it.

At this point, your honor, I cannot give you a date that it ended, but Eastern is no longer in business and it is no longer flying and I believe it is fair to say that it is not in

existence today, but I do not have the ability to tell you that date that it expired.

THE COURT: I understand your position, a fallback position that you have asserted in your brief, as I understand it. You believe that Continental is not bound by the agreement that Eastern made.

MR. PATTON: That is correct. And that is the issue that was addressed at the end of the court's prior decision in Continental I that we were not allowed to [36] raise.

And our view is that the right to seniority integration is a right that arose, if at all, in 1988 or 1987 and it is trapped in our bankruptcy.

THE COURT: That is assuming someone finds that there was a merger.

THE COURT: Correct. If anybody ever arbitrates anything.

MR. PATTON: That is correct as well.

That's all that I have.

MS. FLOWE: If I may, I will first answer Judge Fullam's question.

Under the Railway Labor Act, collective bargaining agreements do not still expire, they merely become amendable. And, in fact, there is some serious question as to whether it is even legal to have a term shown on the face of the agreement so they just keep going and the National Mediation Board gets involved, if necessary, to prevent striking and so forth. So that is the answer to that particular question.

THE COURT: Are there specific [37] collective bargaining agreements between – the Eastern one is the one that you are relying on? How about Continental. They had another one, didn't they?

MS. FLOWE: At this point Continental does. They have since become unionized and they do apparently have a contract with their pilots.

To the extent that an arbitrator were to award seniority integration, it would be that Continental's collective bargaining agreement would govern on all the other terms and conditions of employment.

If I can just go back for just a little bit and perhaps try to use another hypothetical to discuss this issue.

We believe that under the law of the shop, Arbitrator Alcurry's construction of this particular provision in the agreement, it is equivalent to, for example, a contract that might say that each day you owe me money.

Now it may well be that the person who owes the money may stop paying and they file [38] for bankruptcy and at that point they reject that agreement.

If they were to reject that agreement, the creditor would have a claim for not just the amount of money that has not been paid thus far, but the court would look into the feature and would see what the term of this commitment was and would take that (inaudible) payment's present, value it and give them a claim, at whatever priority, probably in bankruptcy dollars for pennies on the dollar.

However, if they don't reject, but if they instead assume that contract, they don't have a claim, the creditor,

at all. Instead, the debtor has an obligation to cure the breach which means making those payments that they missed and continuing to make the payments every day postconfirmation.

In short, all we think the 1997 agreement dealt with was the claim that would have existed for the breach up until the date of confirmation had there not been [39] an assumption, but once the agreement was not rejected, it was assumed.

Briefly, one last point. If the court concludes that you can't interpret the 1997 decision to be limited to the preconfirmation period, we respectfully urge that you reconsider that decision because otherwise we believe that that decision as interpreted decides the will of Congress and would be a beacon for every bankrupt company to come to the Third Circuit where they can get rid of their collective bargaining obligations merely by breaching them.

THE COURT: Thank you. The case was very well argued and we will take it under advisement.

We will take a 10 minute break so that the courtroom can be cleared and then Judge Aldisert, if you will remain on video, we will conference the cases today.

THE COURT: Judge Barry, can we have a transcript of the oral argument in this past Continental case?

THE COURT: Counsel, would you speak [40] to the clerk of the court and provide a transcript to the court.

I would ask that you split the cost, if that is agreeable to you, to both sides.

MR. PATTON: Very good.

MS. FLOWE: Fine.

THE COURT: The crier will close court.

COURT CRIER: This court stands adjourned until September 13, 2001 at 10 a.m.

(End of proceedings.)

[41] CERTIFICATE

I, SHERIL FELDMAN, certify that the foregoing transcript of proceedings in the United States Court of Appeals Court, in the matter of Continental Airlines, Index Number 00-3505 electronic transcription equipment and is a true and accurate record of said proceedings.

SHERIL FELDMAN